in the plaintiffs not getting the kind of hearing intended by the remission, that is to say, a fair hearing.

Further, it cannot be right in principle for an Arbitrator to rely on or quote in justification of his award from a document which he had expressly excluded from his Interim Award and which he had refused the party adversely affected a sight of.

There are two parts to the Remission Order, (1) whether the respondents had made Clauses 25(1)(a) and 25(1)(b) of the Building Contract dated November 15, 1975 part of their case and (2) if so, the Arbitrator do make his findings on the respondents' case under these clauses.

On the first part of the Order he makes a specific finding on Clause 25(1)(a) but he does not make a specific finding on Clause 25(1)(b) as he had on Clause 25(1)(a), although it would appear that, from what was said at the remission hearing, counsel for the respondents at the original arbitration hearing had not abandoned Clause 25(1)(b) but had concentrated on Clause 25(1)(c). In my judgment this is not an unusual stance for a counsel to take.

On the second part of the Order the Arbitrator was to make his findings on the respondents' case under these clauses. On this he ruled that he would not reopen the case and would hear no further submissions as to what notices were given which satisfied termination under Clause 25(1)(b). The case was remitted to him for a specific purpose, and the parties were represented by counsel. It is implicit in our system of justice that parties or their counsel should be heard before judgment is pronounced. But the Arbitrator ruled that he would hear neither party, presumably for the reason, as he says on page 2 of his Findings, that he had perused his notes of evidence carefully. Mr. Wu urges me to say that as both parties were treated in the same way there can be no failure of justice. I cannot accept his proposition. Both counsel would complain, and in my opinion rightly, most bitterly if they were not allowed by the court to address it before a finding of fact or in law is made. On the question of the Arbitrator failing to give the parties a proper opportunity of arguing their case see *Russell* on Arbitration (9th Ed.) at page 469 where the learned author sets out in summary form what the case of *Societe Franco-Tunisienne D'Armement-Tunis* v. *Government of Ceylon*[1] decided and why the award was remitted.

In *E. Rotheray & Sons, Ltd.* v. *Carlo Bedarida & Co.*[2] at the end of the motion to set aside or remit McNair J. observed: —

"The remaining question is whether this award should be wholly set aside or should be remitted to the arbitrators. As regards that, I feel it would be very difficult indeed for Mr. Todd, having once committed himself to the view to which he has committed himself in the award which is sought to be set aside, with the best will in the word, to approach the question with an entirely free mind. I think it is much more likely that justice would be done between the parties if this award were set aside. It will then be open to the parties to take such steps as they think fit to resolve their present dispute. Accordingly, the order of the court will simply be that the award referred to in the notice of motion will be set aside."

I respectfully adopt the words and reasoning of the learned judge and set aside the Interim Award. It is now open to the parties to take such action as they deem fit to resolve their present dispute.

Lastly it would, I think, be remiss on my part if I did not say that during the course of the hearing both counsel referred me to a number of authorities all of which in their sum total were not unhelpful.

Order accordingly.

Solicitors: *Rodyk & Davidson; Donaldson & Burkinshaw.*

GOH GIN CHYE & ANOR. v. PECK TECK KIAN REALTY PTE. LTD.

[A.C.J. (Lai Kew Chai J.) August 17, 1981]
[Singapore — District Court Appeal No. 70 of 1980]

Practice and Procedure — Landlord and Tenant — Claim for possession against tenant — Failure of appellants to include party in trial below as second respondent — Inability of court to decide on merits of appeal — S.C.R. 1970, O. 49 r. 1(5) — Control of Rent Act (Cap. 266), s. 15(i)(g).

Landlord and Tenant — Claim for possession — Failure to include party in trial below as 2nd respondent — Effect of.

The respondents, owners of the premises at 71 Kampong Bahru Road, Singapore, sought for possession of the premises against the appellants. They claimed, *inter alia,* that the appellants had sublet the premises in question to one *R* at the monthly rental in excess of $110% of the reasonable rent of $26 per month under section 15(i)(g) of the Control of Rent Act. *R* was the third defendant in the lower court proceedings.

The learned Senior District Judge held that the relationship between the appellants and *R* was that of a chief tenant and sub-tenant and that all the purported "licence" agreements were a sham and did not reflect the true relationship between them. Against this, judgment, the appellants appealed, citing only the respondents as a party to the appeal. *R*, who was a party in the trial below, was not cited as the second respondent.

Held, dismissing the appeal: *R* was a necessary party as his status and legal rights would be directly affected by any substantive decision in the appeal. As the appellants had failed to comply with Order 49 Rule 1(5) of the Subordinate Courts Rules, the appeal was dismissed without deciding on the substantive merits of the appeal.

Cases referred to:-

(1) *Foster* v. *Robinson* [1950] 2 All E.R. 342.
(2) *Errington* v. *Errington* [1952] 1 All E.R. 149.
(3) *Snook* v. *London & West Riding Investments Ltd.* [1967] 1 All E.R. 518.

DISTRICT COURT APPEAL.

V.K.S. Narayanan for the appellants.

Gan Choon Beng for the respondents.

Cur. Adv. Vult.

Lai Kew Chai J.: The respondents, Peck Teck Kian Realty Pte. Ltd. are the owners of the premises known as No. 71 Kampong Bahru Road, Singapore, including the ground floor, which ground floor is hereinafter referred to as "the premises".

By an action commenced in the District Court the respondents sought possession of the premises against the appellants on the ground that the appellants had contravened an alleged condition in the oral

tenancy agreement under which the appellants were prohibited to sublet the premises without first obtaining the consent of the respondents. Nothing turns on this ground in this appeal as the learned Senior District Judge held in favour of the appellants on this point. The respondents also claimed possession on the alternative ground that the appellants had sublet the premises in question to one Mr. M. Ramalingam at the monthly rental in excess of 110% of the reasonable rent of $26 per month under section 15(1)(g) of the Control of Rent Act ("the Act").

Mr. M. Ramalingam was the 3rd defendant in the District Court proceedings. By his defence he asserted that he was the lawful sub-tenant of the premises and being in lawful occupation of the same he claimed protection against recovery under the Act. It was common ground that the premises were within the ambit of the Act.

After hearing the evidence and by a judgment pronounced on January 30, 1981 the learned Senior District Judge held that the relationship between the appellants and Mr. M. Ramalingam was that of a chief tenant and sub-tenant and that all the purported "licence" agreements were a sham and did not reflect the true relationship between them. Against this judgment the appellants have brought this appeal citing only the respondents as a party to the appeal. Mr. M. Ramalingam, who was a party in the trial below, was not cited as the 2nd respondent.

In this appeal it was canvassed on behalf of the appellants that on a true and proper construction of the written agreements, especially those entered into in 1970, 1973, 1975 and 1977, only a licence rather than a tenancy was created by the appellants in favour of Mr. M. Ramalingam. Mr. M. Ramalingam was alleged to have been given a personal privilege to operate a restaurant to sell Indian food on the premises in respect of which he did not have any interest. Referring to the agreements entered into in 1961 and 1964, appellants argued that the agreements ought to be construed as having created licences although they were described as sub-tenancies. Even if the agreements entered into in 1961 and 1964 had created sub-tenancies, which was not admitted, it was further contended that it was open to the contracting parties to change the relationship from a sub-tenancy to a licence by mutual agreement as they had done. In other words, the appellants were asserting that by mutual agreement the sub-tenancies were terminated and that the licence agreements subsequently entered into in 1970, 1973, 1975 and 1977 had created the relationship of a licensor and licensee. For this submission reliance was placed on *Foster* v. *Robinson.*[1] Relying on *Errington* v. *Errington,*[2] it was also canvassed on behalf of the appellants that it was possible in law for a licensee to have exclusive possession of the premises for a specific purpose. Finally, it was strenuously submitted that the "licence" agreements entered into from 1970 to 1977 ought not to be treated as a sham. He contended that those agreements correctly reflected the relationship between the appellants and Mr. M. Ramalingam. For the documents to be a sham, it had to be shown that they were collectively intended by the appellants and Mr. M. Ramalingam to give to third parties or to the court the appearance of creating between them particular rights and obligations different from the actual rights and obligations which the parties had intended to create: *Snook* v. *London & West Riding Investments Ltd.*[3] In alleging that the learned trial judge had misdirected himself, counsel for the appellants contended that Mr. M. Ramalingam did not allege fraud or misrepresentations on the part of the appellants or their predecessors in title. The appellants complained that the findings of the learned trial judge that the agreements between 1970 and 1977 were a sham were not even pleaded by the respondents nor by Mr. M. Ramalingam.

It will be seen that all these submissions will necessarily affect the status of Mr. M. Ramalingam who, as has been found by the learned trial judge, has been a sub-tenant of the premises operating thereon a restaurant selling Indian food.

Order 49 rule 1(5) of the Subordinate Courts Rules, 1970 requires that a notice of appeal "must be served on all parties to the proceedings who are directly affected by the appeal". It seems to me that the appellants have not complied with this sub-rule. This sub-rule like the other rules of procedure has been framed with the object of making sure that all necessary parties will receive due and proper notice of the case they have to meet and that matters are resolved in their presence as parties. The failure to cite Mr. M. Ramalingam as a party in this appeal is a very serious omission and can give rise to awkward ramifications. If this court should find for the appellants in the absence of Mr. M. Ramalingam, it is true it will not be binding on him. But it will be quite untenable if in any subsequent proceedings between him and the appellants a tenancy is found to subsist as between them.

I had considered the alternative course of directing that the appellants join Mr. M. Ramalingam as the 2nd respondent. As urged by Mr. Gan for the respondents, I declined to make the order as the appellants should start *de novo,* if they are so minded. Their application for enlargement of time to appeal against both the respondents and Mr. M. Ramalingam can be considered on its merits. At that stage, Mr. M. Ramalingam as well as the respondents will have an opportunity of being heard.

I am therefore unable and indeed ought not to decide on the merits of this appeal. Mr. M. Ramalingam is a necessary party as his status and legal rights will be directly affected by any substantive decision in this appeal. As the appellants have not complied with Order 49 rule 1 sub-rule (5) of the Subordinate Courts Rules, 1970, I dismissed this appeal with costs without deciding on the substantive merits of the appeal.

Appeal dismissed.

Solicitors: *F.C. Pillai & Co.: Gan & Associates.*